

STATE OF MICHIGAN
COURT OF APPEALS

SONJA BERRY,

Plaintiff-Appellant,

v

DARRYL BERRY,

Defendant-Appellee.

UNPUBLISHED

May 28, 2009

No. 282343

Livingston Circuit Court

LC No. 04-036033-DM

AFTER REMAND

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's opinion and order entered after remand. Previously, this Court remanded the case to the trial court for further consideration of the amount of marital debt, property division and plaintiff's request for spousal support and attorney fees. *Berry v Berry*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2007 (Docket No. 273427). On appeal, plaintiff once again challenges the trial court's division of the marital property and the trial court's decision to not award spousal support or attorney fees. We vacate the trial court's opinion and order after remand, and, for a second time, remand for further proceedings.

"The law of the case doctrine provides that a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Driver v Hanley*, 226 Mich App 558, 565; 575 NW2d 31 (1997). The lower court, on remand, has a duty to comply strictly with the mandate of the appellate court. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007).

We find no error with respect to the trial court's determination that the marital home was valued at \$305,000.¹ Additionally, the trial court's findings of fact that the tax and credit card

¹ Both parties agreed in their trial briefs that the home was worth \$305,000 and at trial, a real estate agent testified the home could be listed for \$358,000. Because the trial court's determination was within the range of the estimates and because the parties appear to have stipulated to the value of the marital home at the beginning of the divorce proceedings, the trial court's determination was not clearly erroneous. *Gates v Gates*, 256 Mich App 420, 426; 664 NW2d 231 (2003); *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

debt was marital debt was not clearly erroneous because that debt was incurred in order for defendant to earn the income that supported both parties and their children. However, the trial court improperly included within the value of the marital debt loans to defendant that he used to pay attorney fees. In this Court's first opinion, we clearly held "attorney fees are not marital debt" and ordered the trial court "to carefully consider whether loans taken by defendant from his employer and family can be considered as marital debt." *Berry, supra* at 3 n 1. We also noted "the record supports that the personal loans were used to pay defendant's attorney fees." *Id.* On remand, however, the trial court again determined \$10,000 in loans from defendant's employer and defendant's mother constituted marital debt. Because the record indicates that this money was used to fund defendant's attorney fees and because this Court stated in its previous opinion that attorney fees are not marital debt, the trial court failed to comply with this Court's mandate on remand and clearly erred when it determined \$10,000 in loans from defendant's employer and defendant's mother constituted a portion of the marital debt. *Id.* at 3.

Because the trial court's factual finding regarding the marital debt was clearly erroneous, analysis of whether the division of the marital estate was fair and equitable in light of the circumstances is premature. See *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002) ("In dividing marital assets, the goal is to reach an equitable division in light of all the circumstances."). And, because the allocation of marital debt may impact any award of spousal support, on this record we are unable to determine whether the trial court properly denied plaintiff spousal support.

Finally, we further remanded this case to the trial court for further consideration of plaintiff's request for attorney fees. *Berry, supra* at 4. Even though the trial court "correctly observed" that plaintiff committed infidelity and filed for divorce, we noted that plaintiff's decision to file for divorce was not unreasonable. *Id.* "Thus, the pertinent inquiry is whether plaintiff had sufficient income to bear the expense of her attorney fees, whether she would have to invade the assets awarded to her in order to pay, and whether defendant is better able to pay." *Id.* On remand, the trial court reiterated that plaintiff's trial tactics required both parties to incur large attorney fees and noted that defendant was not in the position to pay plaintiff's attorney fees because he assumed the entirety of the marital debt. Neither of these reasons support the trial court's decision. More importantly, the trial court ignored this Court's prior instruction and failed to conduct an analysis of whether plaintiff would have to invade the \$10,000 she was awarded to pay her attorney fees. And, of equal importance, the trial court's general assertion that plaintiff's trial tactics caused the parties to incur large attorney fees is not specific enough to enable this Court to meaningfully review the issue. We caution the trial court on remand not to base its denial on general conclusions that plaintiff's behavior was unreasonable. See *Reed v Reed*, 265 Mich App 131, 165; 693 NW2d 825 (2005).

We vacate the trial court's opinion and order after remand and once again remand for a new hearing and determination pursuant to this Court's original directive in *Berry, supra*. Because a new trial court will hear this matter in light of the original trial court's retirement, it is

not necessary for this Court to require that the matter be reassigned to a different judge on remand.² We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Mark J. Cavanagh

/s/ Jane M. Beckering

² This Court may remand a case to a different judge “if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication.” *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004); *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997). Given the original trial court’s previously expressed views after this Court’s initial remand for further proceedings, it would be reasonable to expect it to have substantial difficulty in putting these views and rulings aside. Absent the original trial court’s retirement, reassignment would have been advisable to preserve the appearance of justice and reassignment would not have entailed excessive waste or duplication.